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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-199

WENDELL OLK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief of Petitioner in Reply to Brief of the United States in Opposition to the Petition.

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Question Presented.

The question as stated in the brief of the United States is deceptively wrong and is not the same question presented to Trial Court and the Court of Appeals.

The pre-trial order in this case was prepared by the tax division of the Department of Justice, approved by Petitioner's counsel and signed by the Honorable Roger Foley, United States District Judge for Nevada, November 27, 1974 R-1-pp. 127-132.

That pre-trial order provided, among other things:

"IV

The following is the issue of fact to be tried and determined upon trial:

Are the monies which were received by the plaintiff from patrons of the Casinos where he worked taxable income or gifts?

V

The issue of law to be tried is whether the monies received by the plaintiff in the manner indicated by the evidence were gifts within the meaning of Section 102 of the Internal Revenue Code."

In the brief filed by the United States in the Court of Appeals it says, on its first page, that the issue presented is whether the District Court erred in holding that taxpayer could exclude from his taxable income as "gifts" the amount of money or "tokes" that he received from patrons at the Las Vegas Casinos where he worked as a dealer.

Now the United States in its brief herein wants this Court to consider that the monies received by the dealer were payments regularly received from the patrons. Nothing could be further from the truth. Payment denotes an obligation to pay for something, services rendered, payment of a debt, or some other consideration received by the payor. The evidence and finding of the District Court make it clear there is no obligation on any patron to give a dealer anything and 90% of the patrons who gamble do not give anything

to the dealer. If monies sometimes received by dealers from patrons are payments, then monies sometimes given by patrons to strangers or mere speculators are also payments.

Nor is there any evidence in the record to indicate that the dealer received "tokes" regularly from patrons. The only evidence is an affidavit which a revenue agent prepared prior to a conference with Petitioner and signed by Petitioner April 10, 1973, in which he admitted receiving in 1971 from patrons at two Casinos where he worked a total of $3750.00—there is no evidence that these monies were received on a regular basis. As a matter of fact, the Department of Justice has reason to know that "tokes" are not received regularly by dealers since it took the deposition of all dealers listed as witnesses by Petitioner in the pre-trial order.

ARGUMENT.

1. Petitioner is familiar with this Court's holding in *Commissioner v. Glenshaw Glass Co.*, and its definition of income under Section 61 of the Internal Revenue Code. Yet that same section of the Code and the regulation quoted in Government brief appendix defining what receipts are regarded as compensation for services, specifically says *unless excluded by law*. That exclusion is provided in Section 102 of the Code and has been part of the Code as long as Section 16 has.

The Appellate Judge who wrote the Court opinion asked Government counsel at the outset, "How do you get around Rule 52 of the Federal Rules of Civil Procedure?" The Court recognized that it could not reverse the Trial Court's findings unless they were clearly erroneous, but it avoids the rule by declaring Finding 18 to be a Conclusion of Law. The Government, neither in its brief, nor oral argument in the Court of Appeals, suggested this and the Court in oral argument never by question to either counsel indicated it might think so.

The Government in this Court seems to agree that Finding 18 is a Conclusion of Law and yet in its brief in the Appellate Court said this Finding was a factual determination and subject to the clearly erroneous rule. The Duberstein, Kaiser and Poyner cases agree that Finding 18 is a Finding of Fact. How then can the Appellate Court say this Finding is a Conclusion of Law? How can the Court hold that the Appellant has rebutted the presumption that the District Court's findings are correct—only by substituting its judgment for that of the District Court contrary

to Rule of this Court in the *Duberstein* and *Kaiser* cases?

2. The District Court did not find that tokes were given dealers out of "affection, respect, admiration or charity or like impulses", but it states in its memorandum opinion that "these spontaneous or superstitious impulses fall within the realm of possibilities contemplated by this Court in *Duberstein* and thus meet the test for a gift under the Internal Revenue Code." A product of detached and disinterested generosity.

The Government brief says tokes are given in a commercial context. Certainly there is no commercial relationship between patron and dealer. They are total strangers to each other. The dealers are employees of the Casinos and paid by them for the services they perform, and they are not permitted to render any special service to a patron.

In the case at bar it is possible that if each of the Appellate Judges were sitting individually as the trier of the facts, that each might find on the record that the tokes given dealers required gift treatment and yet draw different inferences as to the dominant motive. For example, one might agree with the District Court that the dominant motive was disinterested generosity, another might think it was a gratuitous impulse, and a third might infer it was "a tribute to the Gods of fortune, which will bring luck."

The District Court points out that a player's luck is beyond any control by the dealer if the game is an honest one. The dealer has no more control over it than a spectator to whom a patron gives money.

The object is to find which motive is dominant in a field of co-existing motives. The inquiry is not

limited to factors recognized by earlier decisions, so that this case is not absolutely bound by the words "detached and disinterested generosity" to categorize the handing over of money as a gift.

"Impulsive generosity" or superstition on the part of the players the Appellate Court accepts as the dominant motive. How does "impulsive generosity" differ from "detached or disinterested generosity"? It would be difficult to say that a certain percentage of the 5-10% of patrons who "toke" do so under "impulsive generosity" and the remainder are under superstition. The two are not one and the same and yet each by itself does not make for a dominant motive that can be construed as compensation for services and therefore taxable income.

Impulsive generosity connotes a sudden unpremeditated action implying a lack of anticipated benefit of an economic nature.

3. The Government seems to rely on the Appellate Court's statement that its view of the law is consistent with the trend of authority in the area of commercial gratuities. This is a reference to the tip cases. We are not here dealing with the matter of commercial gratuities as recognized all over the country, but with a very unique and different business, and with a limited number of people and these only in the State of Nevada. The District Court recognizes the difference. The Government in its brief here, as it did in the trial and Appellate Courts, insists in calling the money received by Petitioner and dealers as "tips"; and in its brief and oral argument in the Appellate Court it says that tips given waitresses, taxi-drivers, bartenders, etc., cannot be distinguished from "tokes" given dealers by

Casino patrons. By its constant references to what dealers got from patrons as "tips" the Government not only begs the question involved but does what this Court in the *Bogardus* case said you cannot do, that is:

> "You cannot make something taxable by using a subclassification which doesn't apply to it."

The Government relies on the Tax Court case of *Bevers* and the *Roberts* case in the Ninth Circuit. The Tax Court on practically the same evidence as the case at bar did not hold that the "tokes" received were compensation for services but only that they were received as an "incident of employment". That does not meet the test of the statutory requirement of compensation for services. Mr. Stanton would not have received money from Trinity Church had he not been Controller of the Church for many years before his resignation. Yet this Court held that what he got was a gift.

Petitioner agrees with the Ninth Circuit decision in the *Roberts* case. The Court found the taxi-driver had rendered a special service to the donor and also that there was a social compulsion involved in tipping a cab-driver. The Court also said that tipping a cab-driver lacked the essential element of a gift, namely, the transfer of property without consideration. That is the difference between the case at bar and the tip cases.

The District Court in the case at bar did not rule that tips do not represent taxable income. Instead, it ruled that money given to dealers, known colloquially as "tokes" were not tips; that "tokes" were gifts in the peculiar atmosphere of the gaming tables at which

they were made and consequently were excludible from income under Section 102.

4. The Government brief here says Court of Appeals opinion is not inconsistent with *Duberstein* and *Kaiser* cases in this Court but does not tell us why.

If the case at bar were submitted to a jury and the Court under proper instructions submitted as its only interrogatory whether the tokes received by Petitioner were gifts, and had the jury answered in the affirmative, this Court would affirm. That is the *Kaiser* case.

Is this Court going to give more credence to a jury finding than to a Senior United States District Judge who says, in his opinion, that he has "scrutinized the evidence with great care" and concludes that these spontaneous and superstitious impulses fall within the realm of possibilities contemplated by this Court in *Duberstein* and thus meet the test for a gift under the Internal Revenue Code?

5. The fact that the Department of Justice filed a brief opposing the granting of certiorari shows it realizes the importance of the case. It is important to the State of Nevada and its economy.

Conclusion.

The Petition for Writ of Certiorari should be granted for the reasons given in it and in this brief.

Respectfully submitted,

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